Supreme Court No. _____

WASHINGTON STATE SUPREME COURT

COA No. 74930-7-I

In re the Marriage of:

STEPHANIE F. FERGUSON, *f.k.a.* VANDAL,

Respondent,

v.

JOSEPH H. VANDAL,

Petitioner.

JAY VANDAL'S PETITION FOR REVIEW

Gregory M. Miller, WSBA #14459

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I. INTRODUCTION AND IDENTITY OF PETITIONER

Petitioner Jay Vandal asks this Court to grant review on the following issues and the subsidiary issues they contain. ***First,*** Petitioner asks the Court to address an issue left unresolved by *In re Estate of Borghi*[1]: What is the quantum of proof required to establish a spouse's intent to convert his or her pre-marital separate property to community property during the marriage sufficient to overcome the separate property presumption – clear and convincing evidence, or direct and positive proof? The Court of Appeals applied a new standard: evidence that "suggests" Petitioner's pre-marital, separately-owned accounting business was converted to community property by co-mingling *de minimis* community funds in the business and paying community expenses from the business.

Second, for purposes of determining whether the marital community is adequately compensated for the toil of a spouse working in his or her separate business, is the trial court required to credit as part of the compensation to the marital community direct payments of community obligations or debts from the business? Petitioner took a nominal draw from his separately-owned business. During the course of each year the business paid directly many community expenses and the undisputed evidence is that the total financial benefit to the community via express payment to Petitioner

[1] 167 Wn.2d 480, 219 P.3d 932 (2009) ("*Estate of Borghi*" or "*Borghi*").

for his toil and direct payment of community expenses ***exceeded*** the "value" of Petitioner's work as determined by the expert testimony.[2] Through one means or another, all the income from the business was paid to or for the benefit of the community each year.[3] The failure to recognize the direct payments to the community as compensation for Petitioner's toil, in addition to his draws or paid salary, is contrary to at least *State ex.rel Van Moss v. Sailors,* 180 Wash. 269, 276, 39 P.2d 397 (1934), *Toivonen v. Toivonen*, 196 Wash. 636, 84 P.2d 128 (1938), *In re Marriage of Pearson-Maines,* 70 Wn. App. 860, 868 & fn. 6, 855 P.2d 1210 (1993), and common sense.

Third, does the double-counting of a material amount of cash in valuing a business render the resulting property division *per se* inequitable in violation of RCW 26.09.080 such that vacation of the award and remand is required, similar to the requirement to remand for a new property division where the trial court mischaracterizes property and that characterization formed a basis for the ultimate

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[2] The expert found the value of Petitioner's toil for which the community should be compensated was $200,000. 2 RP 274-75. *See* OB 14-16. The combination of Petitioner's draw and the direct payments made from the business for the benefit of the community were about $318,000 per year, substantially exceeding the expert's stated value of Petitioner's toil. *See* OB at 16 and 8-12.

[3] The community thus was "overpaid" for the value of Petitioner's toil, as any private business is free to "overpay" those who work for it. Nevertheless, in disregard of the facts and circumstances, the trial court ruled that the community was only compensated to the extent of Petitioner's formal $70,000 draw which was inadequate (FOF 2.8.2.6, CP 394), refusing to give effect to the direct payments of community expenses, and on that basis concluded the community was inadequately compensated for Petitioner's toil.

property division? *See, e.g.*, *In re Marriage of Kraft*, 119 Wn.2d 438, 449, 832 P.2d 871 (1992).

Finally, does the reasonableness element of the trial court's management of the litigation, and the statutory requirement of a just and equitable distribution, require to the extent possible, that the court provide for the vitality and operational capacity of a business owned or controlled by a spouse where that business is the financial support for the parties and children both during the pendency of the litigation as well as the basis for future maintenance or property division, even if maintaining that business means some diminution of the lifestyle of both the now-separated parties?

II. COURT OF APPEALS DECISION

The decision was filed June 19, 2017 ("Decision" or "Slip Op."), App. A. A timely motion to publish was denied July 31, 2017. App. B. The Decision affirmed the rulings that Petitioner's separate accounting business was converted to community property; the refusal to recognize payments of community obligations by the business as part of the marital community's overall compensation for Petitioner's toil in the business; the valuation of the business which included double counting over $130,000 in cash; the resulting property division that required Petitioner to buy back Respondent's share of the "community" business; and punitive financial constraints on operation of the business during the litigation. App. A.

III. ISSUES PRESENTED FOR REVIEW

1. What quantum of proof is required to demonstrate that the spouse bringing separate property into the marriage intended to and did convert it to community property during the marriage: "direct and positive proof"; or "clear and convincing evidence"; or proof that "suggests" conversion?

2. When calculating the compensation to a marital community for the toil of a spouse working for a separate business, must courts give credit to all forms of compensation redounding to the marital community, both specified wages and draws and also direct payments for community expenses or benefits, including health or auto insurance, or in provided housing?

3. Does the double-counting of a material asset of a business violate the requirement of RCW 26.09.080 of a "just and equitable" property division where that double-counting was relied on by the trial court in its property division?

4. Is the trial court required to refrain from placing constraints that would materially harm or interfere with operation of a business that financially supports the parties during the litigation and is needed to provide income for future maintenance and property settlement, even if that means the prior standard of living cannot be maintained?

IV. STATEMENT OF THE CASE

The Decision gives few of the essential facts in this 14-year, mid-term marriage. *See* App. A., Slip Op. at A-1 to A-2. More complete treatment is found in Petitioner's opening brief ("OB") at pages 3-21, and the Court is directed there.

Petitioner had a ten-year old, pre-marital accounting business when the parties married. 6 RP 854; *see* OB at 4-5. It can be valued at the start of the marriage based on the value given it in Petitioner's divorce that immediately preceded this marriage, when he was

awarded the business as his sole separate property. *See* I RP 21. During the marriage, the business paid all expenses for the community via salary draws taken by Petitioner and direct payment of marital community expenses. 6 RP 866; 5 RP 705. *See* OB at 5. Petitioner never entered into a community property agreement as to the business and never executed any document that can be construed to convert his separate accounting business to community property. The business more than adequately compensated the marital community for his toil as the community received financial benefits well in excess of what the expert found were a proper value for Petitioner's services. *See* fn. 2, *supra.*

A central mistake was using comingling principles to analyze the property issue rather than the principles governing a proper compensation to the marital community for work in the separate business, and whether at the end of the day the marital community would be given a lien against the business instead of ownership in it. As only a co-owner, Petitioner had to "buy back" Respondent's share of the business in the property settlement. *See* OB at 7-12.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Basic Principles Of Distribution Of Marital Property.

In a proceeding for dissolution of a marriage, RCW 26.09.080 governs the disposition of both separate and community property. The statute requires the court to:

> make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:
>
> (1) The nature and extent of the community property;
> (2) The nature and extent of the separate property;
> (3) The duration of the marriage or domestic partnership; and
> (4) The economic circumstances of each spouse or domestic partner at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse or domestic partner with whom the children reside the majority of the time.

RCW 26.09.080. In order to properly exercise discretion to make a "just and equitable" property division, the trial court must not only consider the factors listed in the statute, but also apply the underlying principles and presumptions established by the appellate courts, and then make a decision within all those parameters. *In re Marriage of Muhammad*, 153 Wn.2d 795, 803, 108. P.3d 779 (2005); *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) (stating three-part test to analyze abuse of discretion,[4] and reversing because the test was not met) (numbers added). *Accord, In re Marriage of Chandola*, 180 Wn.2d 632, 642, 653-56, 327 P.3d 644 (2014) (trial court's discretion is "cabined" by applicable statutory

[4] "A court's decision is manifestly unreasonable if it is **[1]** outside the range of acceptable choices, given the facts and the applicable legal standard; **[2]** it is based on untenable grounds if the factual findings are unsupported by the record; **[or 3]** it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard."

provisions, reversing for failure to meet statute's requirement designed to "prevent[] arbitrary imposition of the [trial] court's preferences.").[5]

High among property principles is the sanctity of a person's separate property. This Court has held for over a century that "the right of the spouses in their separate property is as sacred as is the right in their community property." *Guye v. Guye*, 63 Wash. 340, 352, 115 Pac. 731 (1911), quoted in *Borghi*, 167 Wn.2d at 484. This right in separate property also is worthy of protection from the "arbitrary imposition of the court's preferences."

Competing community property principles come into play when a spouse performs services to benefit separate property. Earnings arising from services performed during marriage are community property, and assets acquired during marriage are presumptively community property. *See Hamlin v. Merlino*, 44 Wn.2d 851, 858, 272 P.2d 125 (1954) (citing *In re Estate of Herbert*, 169 Wash. 402, 408, 14 P.2d 6 (1932)); *In re Estate of Madsen v. Commissioner*, 97 Wn.2d 792, 796, 650 P.2d 196, 199 (1982).

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[5] The trial judge thus is not an untethered "knight errant" who may do whatever "justice" he or she deems fit because it is "family law". Rather, the judge is tied to the applicable legal rules and facts of the case. *See Coggle v. Snow*, 56 Wn. App. 499, 504-07, 784 P.2d 554 (1990) quoting and discussing Justice Benjamin Cardozo's famous reflection on the nature of judicial discretion in THE NATURE OF THE JUDICIAL PROCESS (1921). This makes sense. Completely unbridled discretion means, as a practical matter, there are no rules, no accountability, and no predictability for clients and their counsel – there is no law.

However, rents, issues and profits generated by separate property remain separate property. *See* RCW 26.16.010-020. If the owner of a separate property interest who puts community labor into that separate interest is adequately compensated, the remainder of the separate property business and the income generated remain separate property and the community has no right to an equitable lien. *See, e.g., Estate of Herbert.*

At the end of a marriage, each party is entitled to the increase in value during the marriage of his separate property, except to the extent the other spouse shows the increase was due to community contributions. *In re Marriage of Elam*, 97 Wn.2d 811, 816, 650 P.2d 213 (1982). "[A] spouse seeking a community interest in separate property must overcome the presumption that separate property maintains its separate character absent evidence to the contrary." *Pearson-Maines*, 70 Wn. App. at 866, fn. 5 (citing *Hamlin v. Merlino*, 44 Wn.2d at 857-58). "The valuation of the community services invested in separate property may be approached by either determining the equivalent of a reasonable wage or by fixing the resulting increase in value." *Pearson-Maines*, 70 Wn. App. at 869 (citing Harry M. Cross, "The Community Property Law in Washington," 61 WASH. L. REV. 17, 71 (1986)).

B. Review Should Be Granted Per RAP 13.4(1), (2), & (4) To Clarify And Confirm The Proof Requirement To Establish The Change In Character Of Separate Property Brought Into A Marriage And Resolve The Residual Ambiguity And "Uncertainty" Arising From The Three Opinions In *Estate of Borghi*.

1. Review should be granted to resolve the conflict between the Decision and settled law that the requirement for changing the characterization of separate property brought into the marriage requires not a mere "suggestion" but direct and positive proof, if not clear and convincing evidence.

A central issue in this appeal – and a currently unanswered question following the three opinions in *Borghi* – is what proof is required to change the characterization of property in the marital estate once that characterization is established as separate? At what point may separate property which was brought into the marriage – here a business established by one spouse ten years before the marriage – have its character changed and be wholly converted to community property due to "comingling" of funds involved in the operation of the business, as opposed to having a community lien imposed on its increased value? The Decision states that a "suggestion" of an intent to transform separate property into community property will suffice. App. A-6. That is contrary to a long line of this Court's and published Court of Appeals decisions, meriting review per RAP 13.4(b)(1), (2).

Characterization of property in Washington begins with the statutory presumption that property acquired before marriage is

separate. RCW 26.16.010; *Borghi*, 167 Wn.2d at 484 (plurality), 491-92 (concurrence), 219 P.3d 932 (2009); *Marriage of Elam*. In *Elam*, after quoting the principle stated in cases dating to 1911 that "the right of the spouses in their separate property is as sacred as is the right in their community property," this Court settled conflicting decisions in the divisions of the Court of Appeals for how community contributions to separate property – including a business – would be treated. Very simply, the character would not change. Rather, the marital community would share in the increase in value of the separate property or business to the extent of the community contributions which were not otherwise compensated.

> Accordingly, we hold that any ***increase in the value of separate property*** is presumed to be separate property. This presumption may be rebutted by ***direct and positive evidence*** that the increase is attributable to community funds or labors. This rule entitles each spouse to the increase in value during the marriage of his or her separately owned property, except to the extent to which the other spouse can show that the increase was attributable to community contributions.

Elam, 97 Wn.2d at 816-17 (emphasis added). There was no discussion of changing the character of the property.[6]

In *Borghi*, the lead opinion of four justices reiterated that the burden to overcome the statutory presumption of the separate

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[6] The Decision's reliance on *In re Marriage of Skarbek*, 100 Wn. App. 444, 997 P.2d 447 (2000) at App. A-5 is inapposite. *Skarbek* involved ***accounts*** with comingled funds, not an operating business with some community contributions to its operations, all of which were more than offset by the payment from the business of community living expenses.

character of pre-marital property is on the spouse asserting a community interest, then went on to determine that, to change the character, there must be "clear and convincing" evidence of the ***intent*** of the spouse holding the separate property to convert it to community property, equating that test with the older "direct and positive evidence test.[7] *Accord, In re Marriage of Byerly and Cail*, 183 Wn. App. 677, 688-89 & fn. 1, 334 P.3d 108 (2014) (reversing for failure to show evidence of intent to convert character of property, citing *Borghi*).

The Decision allows a different analysis for addressing community contributions to a separate business and a more relaxed standard for converting separate property to community property than stated in *Borghi* and applied in *Byerly* when it holds that "the extensive comingling of funds ***suggests*** that the business lost its nature as separate property." Slip Op., p. 6 (emphasis added).

This analysis is not simply an application of the analysis stated by either the plurality or by Justice Madsen in her concurrence in *Borghi.* Nor is it an application of the principles for allowing an

[7] *Compare Borghi's* lead decision at 167 Wn.2d at 490-91 ("In the absence of clear and convincing evidence to the contrary, the issue must be resolved on the weight of the presumption that the property was . . . separate property.") with Justice Madsen's concurrence, 167 Wn.2d at 491-92 (concurring with four-justice plurality in result and on who bears burden of rebutting the presumption but specifically declaring that the quantum of proof issue need not be reached, referencing the earlier "direct and positive evidence" test in a way that showed she did not yet conclude it was the same as the clear and convincing test).

increase in value in separate property due to community efforts during the marriage, as provided for in *Elam*. Rather, it marks either a direct conflict with, or a major change to the settled law in marital property division as to an operating business brought into the marriage as separate property, and a new way for parties and courts to analyze such matters. According to the Decision, a mere "suggestion" is now adequate to rebut the presumption that determines the character of property as of the date of acquisition.

Review should be granted because the Decision materially conflicts with the settled principle of law in marital property division that, at minimum, "direct and positive proof" is required to overcome the separate property presumption, if not "clear and convincing evidence" of an intent to change the character. Any change to permit a mere "suggestion" in the evidence to justify a change in character of separate property is of great public interest given the large number of divorces and property divisions occurring daily throughout the State, and should be made by this Court.

2. Review should be granted to clarify the "uncertainty" noted in WASHINGTON PRACTICE which was not resolved by *Borghi*.

Borghi's lead opinion details in its footnote 4 an analysis that would equate "direct and positive evidence" with clear and convincing evidence and further direct that overcoming the separate property presumption requires that quantum of proof while

attempting to resolve the uncertainty in this area recognized by the oft-cited treatise on family law in WASHINGTON PRACTICE. The problem is that Justice Madsen did not agree, filing a separate concurrence in the "lead opinion." 167 Wn.2d at 491-92. The dissent refers to Justice Stephens' opinion equating "direct and positive evidence" with "clear and convincing evidence as the "lead opinion" and with which it disagreed. There thus were only four votes for the proposition that clear and convincing evidence is required to overcome the separate property presumption that attaches to property brought into the marriage, like the separate business of Petitioner here, while Justice Madsen said there was no reason to reach the issue of the quantum of proof. That the matter is unresolved is seen from the text of the footnote and the concurrence.[8]

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[8] The court in *Guye* used the phrase "direct and positive evidence" to describe the quantum of evidence necessary to overcome the applicable presumption. 63 Wash. at 352, 115 P. 731. This should be understood as reflecting a "clear and convincing evidence" standard, consistent with the phrasing in more modern cases involving the presumption in favor of community property. *See, e.g., Estate of Madsen v. Comm'r of Internal Revenue*, 97 Wn.2d 792, 650 P.2d 196 (1982). We recognize that various phrasings have been used in our cases throughout the years. **Weber notes this has created some uncertainty**. 19 Weber, *supra*, § 10.5 n. 2, at 138, § 10.6 at 140. Today we make clear that, once a presumption in favor of either community or separate property is established, the burden to overcome the presumption is by clear and convincing evidence. There is no reason to differentiate between the evidence needed to overcome the presumption in these two situations given our recognition that the right of a party in her separate property is "as sacred" as the right of spouses in their community property. *Guye*, 63 Wash. at 352, 115 P. 731.

Borghi, 167 Wn.2d at 485 fn. 4 (emphasis added).

(Footnote continued next page)

Review should be granted to resolve this issue. The 2016 revision of the leading treatise again notes the uncertainty as to the correct standard of proof to determine if the proponent that the separate property presumption of pre-marital separate property has been overcome has met his or her burden for this aspect of marital property divisions. *See* Scott J. Horenstein, 19 WASHINGTON PRACTICE: FAMILY AND COMMUNITY PROPERTY LAW § 10:6, subsection 2, at 196-197 (2016) (noting the "direct and positive evidence "standard adopted in *Guye* when holding the parties' right in their separate property is 'as sacred' as their right in community property, calling out for the same evidentiary standard).

> ¶ 19 The character of property as separate or community is established at acquisition, not at the time of payment, delivery, or conveyance. *In re Marriage of Skarbek*, 100 Wn.App. 444, 447, 997 P.2d 447 (2000). Property acquired before marriage is presumptively separate property. *Id.* **Once established, separate property retains its separate character unless there is direct and positive evidence of a change in character**. *Id.* I agree with the lead opinion that joinder of Bobby Borghi on a fulfillment deed issued during marriage does not, by itself, demonstrate a sufficiently clear intent by Jeanette Borghi to transform her separate property into community property. The separate or community character of property is not determined by the title name under which it is held. In this case there is no evidence explaining why Mr. Borghi's name was included on the deed and no other evidence that Ms. Borghi intended that her separate property become community property.
>
> ¶ 20 I write separately because the lead opinion says that only a writing may serve as evidence in determining whether Ms. Borghi intended to transform her separate real property into a community asset. Lead opinion at [937, 938]. Since there is no evidence, written or otherwise, bearing on the question, **I do not believe this case requires us to decide what type of evidence is sufficient to overcome the separate property presumption** and I would not do so.

Borghi, 167 Wn.2d at 491-92 (Madsen, J, concurring) (emphasis added).

C. Review Should Granted Under RAP 13.4(b)(1) & (3) To Address The Conflict Between The Decision And This Court's Decisions in *State ex. rel. Van Moss v. Sailors* And *Toivonen* And Confirm The Salutary Rule That Payments Of Community Expenses By A Separate Business Is Included In The Compensation The "Community" Receives For The Services Of The Spouse Working In The Separate Enterprise.

The Decision is in conflict with this Court's decisions, including *State ex.rel Van Moss v. Sailors, supra,* 180 Wash. at 276, *Toivonen, supra,* 196 Wash. at 643 (reversing ruling that separate business had been converted to community property because the community's "services were compensated by the payment of their living expenses out of the business."), the Court of Appeals decision in *Pearson-Maines,* and common sense as to how a community can be compensated from a separate business.

The Decision affirmed the trial court's findings that the additional funds beyond his nominal salary which were paid out of his separate business for community living expenses did not count towards the community's compensation for his toil from his work, only Mr. Vandal's nominal salary would be applied. That nominal salary – an owner's typically low draw before end of year – was then deemed inadequate, despite the undisputed evidence that the total receipts and living expenses covered for the community (salary plus other payments) far exceeded what the expert witnesses declared was the value of Mr. Vandal's services. *See* footnote 2, *supra*.

Thus, the Decision conflicts with this Court's settled rule in *Van Moss* that additions to the separate property of the spouse may be "compensated for by withdrawals for living expenses," 180 Wash. 276, and its application in *Toivonen* and *Binge's Estate*. These cases have not been overruled, but cited with approval and by analogy, their principles are carried forward under more modern case names.[9] The Decision shows that, though it should be counted toward the community compensation from separate property-owning spouse's toil for his separate enterprise, such an offset will not always be recognized as income to the community. Rather, a declared nominal salary or draw may be deemed the only "compensation" the community receives for that spouse's toil, ignoring the withdrawals for living expenses from the separate enterprise. *See* Slip Op. at 8-10, App. A-8 to A-10.

This is an issue of substantial public interest. As but one example, many marital couples have one or both partners working in professional capacities in which their spouse cannot share ownership for state licensure and other reasons. In those circumstances the spouse working for his or her separate business takes or receives a

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[9] *See, e.g., In re Estate of Binge,* 5 Wn.2d 446, 460-61, 105 P.2d 689 (1940) (discussing *Van Moss*); *Pearson-Maines*, 70 Wn. App. at 868 fn. 6, discussing *Van Moss, Tivonen,* and *Binge's Estate*, and applying the principle of *Van Moss* by analogy, and summarizing *Van Moss's* rules that where "community expenses were paid with withdrawals from the business, thus compensating the community for its effort . . . accordingly, the commingling did not destroy the separate character of the property."

nominal draw and also pays community expenses – automobile lease, insurance, medical insurance, rent or mortgage – directly from the business either as a practice or for convenience. Draws are kept low for a variety of reasons. These include the difficulties of cash flow that see some businesses receive the bulk of their income near the end of the year. Yet that professional services corporation or professional business may well be supplying all the community living expenses beyond the nominal draw that the owner allots to him or herself, pending end of year true-up calculations. This approach will discourage and dis-incentivize individuals to create or continue their small or family businesses, which are a mainstay of the Washington economy and a key driver to innovation. Not everyone (including professionals) can work for state or local government, or for large companies that can pay monthly salaries. Nor should they.

Review should therefore be granted to resolve the conflict between the Decision and this Court's decisions and clarify the rule to the benefit of the thousands of persons engaged in their separate creative, innovative, or professional enterprises which are providing full support to the marital community. They should receive credit for the total of what is actually provided to the community rather than be penalized for taking draws or salaries which reflect the economic reality of the business in question.

D. Review Should Be Granted To Insure Conformance With the Requirement Of A "Just And Equitable" Property Division in RCW 26.09.080 Which, By Definition, Cannot Include Double Counting Of Assets Or Financially Suffocating The Business That Supports The Community.

1. Double counting of assets is inherently inequitable and violates the letter and spirit of RCW 26.09.080.

The business bank account had a balance of approximately $130,000 as of the separation date of August 4, 2014. It also the same value on December 31, 2014, the valuation date used in the property division. However, that $130,000 was used by the court twice. ***First,*** it was on the balance sheet of the business and was included in valuing the business by the expert, Mr. Kessler. *See* OB at 17-21. ***Second,*** it was used by the trial court as a component of the value of community property. *Id.* Although Mr. Vandal raised the error, *id.*, the Court of Appeals failed to require a correction.

The problem can be seen as a matter of physical property. If Enterprise A (the separate business) has a balance sheet asset of $130,000, for accounting purposes, those funds belong to Enterprise A. Those same funds cannot also be considered assets on the books of Enterprise B, the community enterprise. That one batch of money can only be on the books of one business at a time. This is especially true in the context of a marital property division. Whether the money is in Enterprise A, the separate business and thus separate property; or Enterprise B, the community enterprise and thus community money, it can only exist once at any point in time. The cash cannot,

consistent with principles of equity and justice, be entered into both columns. Review should be granted because the Decision conflicts with this fundamental part of the statute.

E. Review Should Address All Issues Raised At The Court of Appeals, Including That The Overall Distribution Of Assets Was Inequitable And The Inequity Of Imposing Orders That Suffocate The Business That Funds The Parties.

1. The inequity of the overall property division and maintenance award should be addressed when review is granted.

Petitioner's challenge to the overall distribution of assets (AOE 3; OB at 22 – 26) should also be addressed. That will necessarily flow from correction of the characterization of Petitioner's accounting business and the double-counting issues.

2. This Court should instruct the lower courts that orders constraining a separately-owned business must follow a "golden goose rule" of reasonableness.

Petitioner challenged the trial court's imposition of financial obligations on him which went beyond his current earnings from the business both by salary and use of business funds to pay community obligations, and indeed beyond the historic earnings of the business, OB, pp. 22-26, and which penalized him for operating his business. The Court should address the reasonableness of interim orders placing "financial controls" on a separately owned and operated business and its bank accounts which typically evade review. Clarifying the range of reasonableness for such controls is important

for businesses which have seasonal income fluctuations, which include accounting and agricultural businesses. Without a clear statement from this Court, the lower courts can continue to impose unreasonable constraints which evade review because there is no "clear legal violation" which would enable quick appellate relief on an interlocutory basis when it could still do any good.

Where the divorcing couple has been living at or beyond their means from the separate business while living together, that same lifestyle normally cannot reasonably be supported for both in two households while also covering the costs of the dissolution process. Particularly where there will be future maintenance and/or a staggered property distribution based on future earnings from that separate business, continued and stable operation of the business, is critical.

Petitioner suggests a "golden goose rule" of reasonableness must apply to a spouse-owned or controlled business which pays all or most of the owner-spouse's salary, and needs to continue to be the basis to pay community bills, child support, and the court-ordered maintenance. To be equitable and lawful, any constraints must be limited to the minimum necessary while insuring the "golden goose" business's ability to operate and maintain its financial health so that it can keep funding those obligations, pending the final property division.

VI. CONCLUSION

Petitioner Jay Vandal respectfully asks the Court to grant review and schedule argument for the earliest opportunity.

Dated this 30th day of August, 2017.

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By _____
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APPENDIX A

N THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Marriage of: STEPHANIE F. VANDAL, Respondent, and JOSEPH H. VANDAL, Appellant.	)	No. 74930-7-I DIVISION ONE UNPUBLISHED OPINION FILED: June 19, 2017

APPELWICK, J. — The trial court divided the Vandals' property upon the dissolution of their marriage. Joseph contends that the trial court erroneously classified his business as community property. He asserts that the trial court double counted the business's bank accounts. He argues that the overall distribution of property is inequitable, considering the judgments against him. We affirm and award attorney fees to Stephanie.

FACTS

Joseph and Stephanie Vandal were married on August 4, 2000. Joseph's[1] two young children from his prior marriage lived half of the time with the couple. Stephanie became a stay-at-home mother to care for the children.

The couple had a son together, who was born on June 25, 2002. Their son has been diagnosed with autism spectrum disorder.

[1] We refer to the parties by their first names for clarity. No disrespect is intended.

During the marriage, the couple's sole source of income was Joseph's business. Joseph started his own business as a certified public accountant (CPA) in 1989 and incorporated it in 1991. He received a salary of approximately $70,000 from the business.

Joseph and Stephanie separated on August 2, 2014. Stephanie filed for dissolution. After trial, the court entered lengthy findings of fact and conclusions of law. The court found that the parties' community property included: the proceeds from the sale of the former family home; the business known as Joseph J. Vandal, CPA, P.S., together with its bank accounts and fungible assets; specific furniture and personal property; a 2007 BMW; and funds in bank accounts at the time of the parties' separation or as transferred after separation from community funds. Stephanie's share of the community property was worth $211,646, while Joseph's was $787,007. Accordingly, the court awarded Stephanie a $287,680 equalizing payment.[2]

Joseph appeals.

DISCUSSION

Joseph argues that the trial court erroneously classified the business as community property. Br. of Appellant, 7. He contends that even if this characterization was proper, the trial court erred by awarding him the business's bank accounts twice. He further asserts that the overall distribution of assets was

[2] The court noted that this payment could also be viewed as a $175,513 equalizing payment, plus reimbursement for mortgage payments in the amount of $17,167, plus reimbursement of the increase in the line of credit of $95,000.

inequitable, especially the maintenance award to Stephanie. Stephanie argues that she is entitled to attorney fees on appeal.

I. Community Property

Joseph argues that the trial court erred in characterizing his business as community property. He asserts that because the business was established before the marriage, it was presumed to be separate property, and the burden was on Stephanie to prove otherwise. Joseph challenges the findings of fact supporting this characterization and the conclusions of law on this issue.[3]

A court's characterization of property as separate or community is a question of law reviewed de novo. In re Marriage of Griswold, 112 Wn. App. 333, 339, 48 P.3d 1018 (2002). But, factual findings upon which the court's characterization of property is based are reviewed for substantial evidence. Id. Substantial evidence is evidence of sufficient quantity to persuade a rational person of the truth of the stated premise. Id.

The character of property as separate or community property is determined as of the date that the property was acquired. In re Estate of Borghi, 167 Wn.2d 480, 484, 219 P.3d 932 (2009). Once property is established as separate property, a presumption arises that it remained separate property. Id. But, this presumption can be rebutted with sufficient evidence that the owner intended to change the property from separate to community property. Id.

[3] Specifically, Joseph challenges findings of fact 2.8.2.3, 2.8.2.4, 2.8.2.5, 2.8.2.6, and 2.8.2.7 and conclusions of law 3.4.5.1(f), 3.4.5.2(a), and 3.4.5.4(e).

Here, the court characterized Joseph's business, Joseph J. Vandal CPA P.S., as community property. The business does audits and tax returns for condominium homeowners' associations (HOAs). Joseph began the business in 1989 and incorporated it in 1991, before the marriage. Thus, it was separate property at the time of the marriage.

But, the court determined that the business lost its characterization as separate property. The court found that community funds were paid into the business. And, many community and family expenses were paid through the business during the marriage. While Joseph characterized these payments as loans and said that the accounts were reconciled at the end of the year, no records verified this allegation. Consequently, the court did not find Joseph's testimony to be credible. The court further found that almost the entirety of the business's value was based on the goodwill generated by Joseph's toil. The valuation experts and Joseph testified that the clientele of the business required constant renewal. And, the court found that Joseph's salary of $70,000 was inadequate to compensate the community for his labor. Adopting primarily the analysis of Stephanie's expert, Steven Kessler, the trial court found the value of the business was $446,000, and awarded it to Joseph.

A. Commingling

Joseph argues that the trial court's findings are not supported by substantial evidence. First, he contends that the minimal commingling between the business accounts and community accounts does not support characterizing the business as community property.

Where separate property is commingled with community property with no effort to keep the two separate, it becomes community property. In re Marriage of Skarbek, 100 Wn. App. 444, 448, 997 P.2d 447 (2000). Commingled funds are presumed to be community property. Id. The burden is on the spouse claiming separate funds to clearly and convincingly trace the funds to a separate property source. Id.

Joseph testified about the commingling of business and community funds. He said that all of the income earned from the business went to the community. Stephanie would sign checks for community expenses. Joseph would then write a check from the business into their joint account. He would write "loan" on the check to indicate that it was money coming from the business.[4] The community paid its expenses in this way, including the mortgage, line of credit, utilities, plastic surgery, vacation rentals, and their son's schooling. This evidence supports the trial court's finding of fact 2.8.2.4.

Joseph also testified that he used an equity line of credit secured by the family house for the business. He explained that when there was a deficit with the business, he would use this equity line of credit. During his deposition, he estimated that around $100,000 had been drawn from the equity line of credit for shortages in the business. This evidence supports the trial court's finding of fact 2.8.2.3.

[4] No evidence was presented that these loans were ever repaid or that the accounts were otherwise reconciled. As such, the trial court found that Joseph's testimony that these expenses were loans was not credible. Credibility determinations are for the trier of the fact, and this court will not review them on appeal. In re Marriage of Burrill, 113 Wn. App. 863, 868, 56 P.3d 993 (2002).

Joseph argues that the commingling of business and community funds does not establish that the business became community property. But, Joseph failed to produce records at trial to show that the loans from the business to the community were ever reconciled. Nor did he show that these funds were treated as loans for purposes of federal taxes. These records would have been in Joseph's control, yet he—a CPA—did not produce them. We conclude that the extensive commingling of funds suggests that the business lost its nature as separate property.

B. Goodwill

Second, Joseph argues that the value of the business was not primarily based on his own labor. Joseph argues that much of the company's goodwill is based on the creation of systems that he set up early on and allowed the company to largely run itself.

Washington recognizes professional goodwill as an intangible property subject to division in a dissolution. In re Marriage of Brooks, 51 Wn. App. 882, 884, 756 P.2d 161 (1988). Goodwill is often defined as an expectation of continued patronage. In re Marriage of Hall, 103 Wn.2d 236, 239, 692 P.2d 175 (1984). Goodwill is a property or asset that supplements the earning capacity of another asset, a business, or a profession. Id. at 241. It is a distinct asset, not merely a factor contributing to the value of a business. Id. Where goodwill is acquired during marriage, it may be community property. See Brooks, 51 Wn. App. at 888-89.

Both parties' experts testified about the valuation of Joseph's business, including the goodwill. Kessler, Stephanie's expert, used the excess earnings approach to determine the amount of goodwill in the business. Kessler began by calculating the net tangible assets of the business, which reflects Joseph's net investment in the practice. Once he determined the business's sustainable earnings, the next step was to determine a market based compensation for Joseph. Kessler selected a compensation of $200,000 to represent Joseph's unique skillset. Using a capitalization rate of 22 percent, Kessler found the goodwill value to be $496,234. He valued the business at $534,598.

Douglas McDaniel, Joseph's expert, also testified about the valuation of the business. McDaniel used the excess earnings approach method as well. But, McDaniel used a different capitalization rate of 26.8 percent. And, he used a different market based compensation of $235,000. Under this approach, McDaniel came up with a goodwill value of $255,078. McDaniel valued the business at $271,466.

The court did not fully adopt either expert's analysis. Instead, it adopted McDaniel's capitalization rate of 26.8 percent to reflect the risk inherent in the business. Otherwise, the court adopted Kessler's analysis. Kessler submitted a revised business valuation based on the court's order. Using this capitalization rate, the indicated goodwill value was $407,356. The indicated value of the business was $445,720.

The risk inherent in the business included the fact that Joseph has to go up for bid every year, and there are competitors. Joseph testified about this risk. He

explained that every year the business has to go out for bid. Then, they have to follow up and meet with the clients. He recognized that his clients do not have much loyalty to him, because the HOA boards and the condominium management companies change frequently. His clients' loyalty is also extremely price sensitive: if they can save even $300, then they will switch accountants nine times out of ten. And, he said that a lot of how he gets new clients is "just going out there, shaking hands."

Joseph presented no evidence of the value of the business's goodwill prior to the marriage. He could have produced records to establish that the company's goodwill was not the result of his own labor. But, he did not do so. We conclude that the experts' testimony supported the finding that the value of the business was based almost entirely on goodwill. And, Joseph's client base had constant turnover, requiring him to constantly go out and form new relationships with new clients.

Joseph's toil was community labor. See In re Marriage of Lindemann, 92 Wn. App. 64, 76-77, 960 P.2d 966 (1998) (increased value in cohabitant's business was community in character because it had been achieved by community labor). Thus, we conclude that substantial evidence supports the finding that the business's goodwill was developed by community labor.

C. Compensation to Community

Third, Joseph asserts that the community was more than adequately compensated for his toil. He contends that the finding of fact which sets out his salary is misleading. Joseph argues that since all of the substantial funds used by

the community came from the business—approximately $318,000 per year—the community received far more compensation than merely Joseph's salary.

The community is entitled to the economic benefit of a spouse's services. Pollock v. Pollock, 7 Wn. App. 394, 401, 499 P.2d 231 (1972). Consequently, if a spouse "seeks to retain the separate character of income derived from a combination of his separate business and his post-marital personal services with respect thereto, he is required to make a contemporaneous segregation of the income so derived as between the community and his separate estate." Id. This can be done by allocating a reasonable, fair salary to the community. Id.; Brooks, 51 Wn. App. at 886-87. Whether a salary is fair depends largely on the earnings of the business at the time. Brooks, 51 Wn. App. at 887.

Here, Joseph made no attempt to keep the business's income separate from the community, as discussed above. He admits that his salary of $70,000 was insufficient to compensate him for his labor. He admits that community expenses were paid from the business's income rather than merely from his salary. Thus, the trial court's finding that Joseph's salary alone was inadequate to compensate the community for his labor is supported by substantial evidence.

The trial court's findings regarding commingling, goodwill, and compensation to the community are supported by substantial evidence. The majority of the business's value was derived from goodwill. This goodwill was created by Joseph's labor and was a community asset. Joseph did not adequately compensate the community for his toil. And, he did not produce records at trial to show that community and business funds were treated separately. Therefore, we

conclude that there was clear, cogent, and convincing evidence to overcome the presumption of separate property. The trial court did not err in characterizing the business as community property.

II. Double Counting

Joseph argues that the trial court erred by double counting assets that it awarded to him. He contends that the trial court awarded him the business's bank accounts twice. This is so, he asserts, because the valuation of the business included the business's bank accounts, yet the trial court awarded both the value of the business and its bank accounts to Joseph.

The trial court has broad discretion to distribute property in a dissolution proceeding. In re Marriage of Wallace, 111 Wn. App. 697, 707, 45 P.3d 1131 (2002). A party challenging a property distribution must demonstrate that the trial court manifestly abused its discretion. Id.

Joseph raised the issue of potential double counting after the trial court issued its memorandum opinion. He supported this with a declaration of his expert, who stated that the bank accounts were included in the value of the business. During the hearing to enter the final orders, the trial court invited Joseph to move for reconsideration on this issue. Joseph did not do so. Nor did he attempt to identify and trace the allegedly double counted funds at the hearing.

Joseph still has not identified and traced these funds on appeal. Instead, he simply asserts that the court must have double counted funds, because it counted the business's bank accounts twice. But, Joseph's argument overlooks

the different dates between the valuation of the business and the valuation of the bank accounts.

The experts included the liquid assets of the business in their valuations. However, both experts used a valuation date of December 31, 2014. In awarding the business's bank accounts to Joseph, the trial court used a valuation date of August 2, 2014, the date of separation. In fact, the trial court valued the bank accounts as of the date of separation to account for Joseph's extensive postseparation withdrawals, which were made in violation of a temporary restraining order. During the five months that passed between the trial court's valuation date and the business's valuation date, Joseph withdrew funds across accounts, and the business was still operating. Because Joseph never provided records that could identify the exact funds he claims were counted twice, we conclude that the trial court did not abuse its discretion.

III. Maintenance

Joseph contends that the trial court set his continuing financial obligations, including maintenance, beyond his earnings. While he does not challenge any of the findings of fact supporting these obligations except those previously discussed, Joseph contends that the overall distribution is inequitable.

RCW 26.09.090(1) permits the trial court to grant a maintenance order for either spouse, in such amounts and for such periods of time as the court deems just. The court must consider all relevant factors including: the financial resources of the party seeking maintenance and that party's ability to meet his or her needs independently; the time necessary to obtain education or training to enable the

party to find employment; the standard of living established during the marriage; the duration of the marriage; the age, health, and financial obligations of the party seeking maintenance; and the ability of the party from whom maintenance is sought to meet his or her needs while still meeting those of the other party. RCW 26.09.090(1)(a)-(f).

An award of maintenance is within the broad discretion of the trial court. In re Marriage of Terry, 79 Wn. App. 866, 869, 905 P.2d 935 (1995). The only limitation on the amount and duration of maintenance under RCW 26.09.090 is that the award must be just. In re Marriage of Bulicek, 59 Wn. App. 630, 633, 800 P.2d 394 (1990). We will find an abuse of discretion only if the trial court bases its award or denial of spousal maintenance on untenable grounds or for untenable reasons. Terry, 79 Wn. App. at 869.

The trial court ordered Joseph to pay maintenance to Stephanie in the amount of $9,000 per month for 72 months. It based this on the fact that both parties are in good health, but Stephanie did not work outside the home during the marriage. While Stephanie intends to go back to school to obtain a master's degree and teaching certificate, this will take about five years. The parties had a high standard of living during the marriage, and Joseph's income is $26,501 per month. And, the court found that Joseph's income far exceeds his personal living expenses.

Joseph does not challenge any of these findings, and therefore they are verities on appeal. In re Marriage of Petrie, 105 Wn. App. 268, 275, 19 P.3d 443 (2001) (unchallenged findings of fact are verities on appeal). But, he contends that

the court should have considered his debts and other judgments when determining the overall distribution. Joseph points out that in addition to the $9,000 per month maintenance order, he also has to pay $1,034 per month in child support for their child and health insurance for the child. And, he is $90,000 in debt on the business line of credit, which requires monthly payments of about $2,400.

Joseph also points to the judgments against him: $175,513.25 as an equalizing payment to Stephanie to arrive at a 50/50 division of community property, $95,000 to Stephanie to reimburse her for withdrawals on the home line of credit, $17,167.12 to reimburse Stephanie for mortgage payments, and $101,691.39 to reimburse their son for withdrawals from his UTMA (uniform transfer to minors) account. He suggests that he cannot pay off these judgments while making the required monthly payments. And, he alleges that the maintenance award is a windfall, because Stephanie will receive the benefit of the judgments in addition to considerable personal property.

This court has previously upheld maintenance awards to spouses who received significant property awards. See, e.g., In re Marriage of Wright, 179 Wn. App. 257, 261, 270, 319 P.3d 45 (2013). In Wright, the trial court awarded $8,526,834 in community property to the wife, along with a $1.7 million equalizing payment and maintenance of $1 million spread over three years. Id. at 261. It awarded $8,657,042 in community property and $979,966 in separate property to the husband. Id. The husband argued that the trial court abused its discretion by awarding maintenance, because the wife did not demonstrate financial need in light of the property awarded. Id. at 269. The Court of Appeals rejected this

argument, noting that financial need is not a prerequisite to maintenance. Id. at 269-70.

Given the trial court's findings regarding Joseph's salary of $26,501.47 per month, the middle range length of the marriage, the parties' standard of living during the marriage, and Stephanie's role as caregiver for the children during the marriage, we cannot say that the trial court abused its discretion in awarding $9,000 in monthly maintenance. The award is just in light of the parties' financial positions.

This is so even in light of the judgments against Joseph. The trial court may properly consider a spouse's waste or concealment of assets in making a property distribution. Wallace, 111 Wn. App. at 708. Here, Joseph violated the temporary restraining order put in place after the parties separated by withdrawing large sums of money from community accounts. The parties separated on August 2, 2014. On September 15, 2014, the court entered a temporary order imposing financial restraints on the parties. Under these restraints, the parties were prohibited from transferring property or withdrawing any monies from checking accounts of either or both parties, unless in the ordinary course of business or for the necessities of life. And, the parties were ordered notify the other of any extraordinary expenditures. The court also ordered that Joseph was responsible for paying both mortgages on the family home.

In violation of this order, Joseph withdrew a total of $130,691 from community accounts. He failed to pay the first and second mortgages on the family home. Consequently, the mortgages were in arrears in the amount of $17,167

when the home was sold, thereby reducing the proceeds from the sale. Joseph also drew $95,000 on the equity line of credit secured by the family home after separation. And, Joseph completely emptied the son's UTMA account, which contained $101,691 at the time of separation.

These judgments against Joseph do not make the maintenance award unjust. The judgments stemmed from Joseph's actions taken in direct violation of a court order. It was not an abuse of discretion to hold him accountable for those actions.

IV. Attorney Fees

Stephanie asserts that this court should award her attorney fees on appeal. She contends that she should not be required to use the maintenance and property assets awarded to her to defend the trial court's decisions. Both parties have submitted financial declarations so that we may determine whether to award attorney fees and costs.[5]

Under RCW 26.09.140, a court has discretion to award attorney fees to either party depending on the parties' financial resources. The court should balance the financial need of the requesting party against the other party's ability to pay. In re Marriage of Pennamen, 135 Wn. App. 790, 807-08, 146 P.3d 466 (2006).

Stephanie's financial declaration lists her monthly gross income, which consists of maintenance and child support, as $10,034. Her total net income is

[5] Stephanie moved to strike Joseph's financial declaration as untimely. Joseph filed a response, requesting an extension. We deny the motion to strike, and we consider both parties' financial declarations.

$8,394. Stephanie lists monthly expenses totaling $8,400. And, she states that she has no savings to protect her in case of an emergency. Joseph has not made the equalizing payments that could alter Stephanie's financial position.

Joseph's financial declaration states that his monthly gross income is $23,673. His monthly net income, after taxes and maintenance, is $10,203. He lists his monthly household expenses as $7,853. Joseph also asserts that he has monthly payments totaling $3,060.60 toward his other debts.

However, Joseph's listed personal monthly debt payments, such as car and health insurance, were historically paid through the business, not personally, based on the evidence presented at trial. This is supported by the fact that Joseph did not list these expenses on the financial declaration submitted to the court below.

Therefore, we conclude that Stephanie has financial need and that Joseph has the ability to pay her attorney fees. We award Stephanie her appellate attorney fees and costs, subject to her compliance with RAP 18.1(d).

We affirm.

WE CONCUR:

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In re the Marriage of: STEPHANIE F. VANDAL, Respondent, and JOSEPH H. VANDAL, Appellant.	)	No. 74930-7-I ORDER DENYING MOTION TO PUBLISH

The appellant, Joseph Vandal, has filed a motion to publish. The respondent, Stephanie Vandal, has filed an answer. A majority of the panel has determined that the motion should be denied. Now, therefore it is hereby

ORDERED, that the motion to publish is denied.

DATED this 31st day of July, 2017.

Judge

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

Richard D. Johnson, Clerk/Administrator Court of Appeals – Division I One Union Square 600 University Street Seattle, WA 98101	☐ U.S. Mail, postage prepaid ☐ Messenger ☐ Fax ☐ E-mail ☒ Other - Appellant Court Portal
Marijean Moscheto MoschettoLaw PLLC 2300 130th Ave NE, Ste A201 Bellevue, WA 98005-1755 marijean@moschettokoplin.com Pattie@moschettokoplin.com	☐ U.S. Mail, postage prepaid ☐ Messenger ☐ Fax ☒ E-mail ☒ Other - Appellant Court Portal
David B. Zuckerman Attorney at Law 705 Second Avenue, Suite 1300 Seattle, WA 98104 David@DavidZuckermanLaw.com	☐ U.S. Mail, postage prepaid ☐ Messenger ☐ Fax ☒ E-mail ☒ Other - Appellant Court Portal
Catherine Wright Smith Valerie A. Villacin Smith Goodfriend PS 1619 8th Avenue North Seattle, WA 98109-3007 cat@washingtonappeals.com valerie@washingtonappeals.com	☐ U.S. Mail, postage prepaid ☐ Messenger ☐ Fax ☒ E-mail ☒ Other - Appellant Court Portal

DATED this 30th day of August, 2017.

Elizabeth C. Fuhrmann, PLS, Legal Assistant/Paralegal to Gregory M. Miller

CARNEY BADLEY SPELLMAN

August 30, 2017 - 4:28 PM

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